

Mason Medical Communications, Inc. v Rogers

2008 NY Slip Op 30133(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0601523/2007

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richard B. Lowe III
Justice

PART 56

Urban Medical Communications

INDEX NO. 601523/07

MOTION DATE 11/28/07

- v -

MOTION SEQ. NO. 001

Royce

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

NOTICE TO APPEAR FOR THE HEARING
WITH A WRITING
DECISION

RECEIVED
JAN 14 2008
MOTION SUPPORT
OFFICE

Dated: 1/7/08

RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MDAI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
MASON MEDICAL COMMUNICATIONS, INC.,

Plaintiff

Index No: 601523/07

-against-

DECISION AND ORDER

BARBARA ROGERS, ROBERT (BOB)
RUBIN, VLADY ROZENBAUM, PhD, CARL
WIEZALIS, KAY COX, and NATIONAL
EMPHYSEMA/COPD ASSOCIATION

Defendants.

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
RICHARD B. LOWE III, J:

This dispute arises out of two contracts between Plaintiff Mason Medical Communications ("MMC") and Defendant National Emphysema/Chronic obstructive pulmonary disease Association ("NECA"). Defendants move pursuant to CPLR 3211(a)(7) and 3211(a)(11) to dismiss the third cause of action in part and the first, second, fourth and fifth causes of action in their entirety.

BACKGROUND

MMC is a corporation engaged in the business of providing consulting and management and publication services for the healthcare industry. Howard Mason ("Mason") is a principal of MMC.

NECA is a not-for-profit corporation which seeks to aid persons suffering from chronic obstructive pulmonary disease. Defendant Barbara Rogers ("Rogers") served as the Chairman of the Board of Directors of NECA and as President of NECA. Defendant Robert Rubin ("Rubin")

served as a member of the Board of Directors and as the Treasurer of NECA. Defendant Vlady Rozenbaum, PhD (“Rozenbaum”), served as a member of the Board of Directors of NECA. Defendant Carl Wiczalis (“Wiczalis,” together with Rogers, Rubin, and Rozenbaum as the “Directors”) served as a member of the Board of Directors of NECA. Defendant Kay Cox served as a member of the Board of Directors of NECA.¹

The Complaint alleges:

On August 1, 2005, a Management Agreement was entered into by and between MMC and NECA. Also on August 1, 2005, a Fund-Raising Agreement (together with the Management Agreement referred to as the “Agreements”) was entered into by and between MMC and NECA. In conjunction with the Agreements, NECA appointed Mason as its Executive Director.

From August 1, 2005 until the date of termination, MMC raised in accordance with the Fund-Raising Agreement approximately \$709,700.00 of which \$229,000.00 had been received.

Over time, several incidents caused Mason to develop concern over his involvement with NECA and specifically with Rogers. Among other things, Mason observed that the travel expenses being charged by Rogers, who traveled extensively on behalf of NECA, far exceeded her travel expenses spent the previous year.

Rogers also began to regularly complain to Mason that she was doing a great deal of volunteer work for NECA and that she needed instead to earn a living.

In August 2006, Mason received a call from Rogers who demanded a “kickback” and stated that MMC share all income being earned by it with her 50/50. Mason refused Rogers’

¹Plaintiff discontinued this action against Defendant Kay Cox pursuant to a Stipulation Discontinuing Action Without Prejudice Against Defendant Kay Cox Only entered into on May 31, 2007. (Kozusko Aff Ex B.)

request.

Thereafter, Mason received another call from Rogers who stated that she wished to go into business with him and that they would form a company to run NECA. Rogers also stated that she received the approval of Rubin to investigate the possibility, provided she obtained the consent of the Board. Rogers later received the consent of the Board. Again, Mason decided that he would not go into business with Rogers and they would not form a company together.

After Mason informed Rogers that he would not form a company with her, the attitudes of Rogers and the Board changed negatively. In November 2006, Mason was informed that the Board would be meeting to discuss whether NECA could afford MMC's Agreements going forward. Mason's request to be present on the call and speak was denied. On December 8, 2006, MMC received a letter from NECA terminating both the Management Agreement and the Fund-Raising Agreement, purportedly in accordance with Paragraph 3 of each contract. The letter stated that NECA could no longer afford the services of MMC and Mason.

Averring that Rogers intentionally persuaded the NECA Board to terminate the Agreements, MMC commenced this action asserting causes of action sounding in tortious interference, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing. In its fifth cause of action, MMC also seeks punitive damages against Rogers and Rubin. Defendants move pursuant to CPLR 3211(a)(7) and 3211(a)(11) to dismiss the third cause of action in part and the first, second, fourth, and fifth causes of action in their entirety.

DISCUSSION

Qualified Immunity Under CPLR 3211(a)(11)

The Directors argue, without dispute, that they are entitled to qualified immunity under Not-For-Profit Corporation Law 720-a. MMC responds that the issue of qualified immunity requires the Court to make a factual determination.

On a motion made pursuant to CPLR 3211(a)(11), “[the court] is obligated to determine whether the defendant is entitled to the benefits conferred by [Not-For-Profit Corporation Law] 720-a and, if it so finds, then it must ascertain whether there is a reasonable probability that the specific conduct of the defendant fell outside the protective shield afforded” (*Rabushka v Marks*, 229 AD2d 899, 900 [3d Dept 1996]; *Durante Bros. Constr. Corp. v College Point Sports Ass’n*, 207 AD2d 379, 380 [2d Dept 1994]; *Pontarelli v Shapero*, 231 AD2d 407, 410 [1st Dept 1996]).

Here, because the entitlement to qualified immunity is undisputed, the issue before the Court is whether MMC has demonstrated a reasonable probability of gross negligence or intentional harm (*Rabushka*, 229 AD2d at 900). As to Directors Rozenbaum and Wiezalis, MMC has not “alleged any facts which indicate that they played any role” in terminating the Agreements (*Pontarelli*, 231 AD2d at 410). Principally, MMC alleges that the Board held a meeting to discuss whether NECA could afford the Agreements going forward, denied Mason’s request to attend the meeting, and, thereafter, terminated the services of MMC (Compl ¶ 37); that, around the time that the Agreements were terminated, the Board approved a contract in the name of Rogers to provide services (Compl ¶ 38); that the Board’s termination of the Agreements and approval of Rogers’ contract were not in good faith (Compl ¶ 39); and that the Board rendered no independent judgment or determination (Compl ¶ 40). Even assuming that

Rozenbaum and Wiezalis were present at these Board meetings and voted in accordance with the Board, here not alleged, MMC’s conclusory allegations do not rise to the level of gross negligence or intentional harm. As to Rubin, MMC adds the allegation that Rubin’s relationship as a principal of another entity and as Treasurer of NECA created a conflict of interest as to his vote to terminate the Agreements (Compl ¶ 46). Again, MMC’s conclusory allegations do not rise to the level of gross negligence or intentional harm. Although New York courts seldom address qualified immunity under CPLR 3211(a)(11) and Not-For-Profit Corporation Law 720-a, the factual allegations here are insufficient as compared to those cases where courts have found a reasonable probability of gross negligence and/or intentional harm (*see e.g. Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 2d 561, 571 [Sup Ct Queens County 2003]; *Rabushka*, 229 AD2d at 901). Moreover, MMC’s belatedly verified Complaint is sworn to by MMC’s counsel, rather than someone with first-hand knowledge of the allegations therein (*see Rabushka*, 229 AD2d at 900-901).² In order for the Court to make a factual determination, MMC must first make a prima facie showing of gross negligence or intentional harm, which it fails to do. Accordingly, because MMC does not dispute that the Directors are entitled to qualified immunity and because MMC fails to sufficiently allege gross negligence or intentional harm on the part of Rozenbaum, Wiezalis and Rubin, the causes of action against these three Directors are dismissed.

As to Rogers, however, MMC alleges that, in August, Rogers demanded “kickbacks” from Mason (Compl ¶ 31); that Rogers called Mason to express that she wished to go into business with him (Compl ¶ 32); that Mason stated to Rogers that he would not go into business

²MMC originally filed an unverified complaint. After being directed by the Court to submit a verified complaint, MMC subsequently did so.

with her (Compl ¶ 33); that, in October, the attitude of the Board changed after Mason informed Rogers he would not form a company with her (Compl ¶ 36); that, in November, the Board terminated the Agreements (Compl ¶ 37); that Rogers intentionally persuaded the Board to terminate the Agreements (Compl ¶ 50); and that the Board ultimately approved a contract in the name of Rogers (Compl ¶ 38). Thus, MMC demonstrates a reasonable probability that Rogers intentionally caused the resulting harm to MMC. Accordingly, Rogers is precluded from asserting qualified immunity under CPLR 3211(a)(11).

Breach of Implied Covenant of Good Faith and Fair Dealing (second cause of action)

MMC alleges that “NECA breached its duty of good faith in the performance and termination of its contract with [MMC]” (Compl ¶ 53).

Defendants argue that MMC’s cause of action for breach of this duty impermissibly attempts to use the implied covenant of good faith to nullify rights expressly provided for by contract and is duplicative of its breach of contract cause of action.

Generally, “the implied covenant of good faith cannot create new duties that negate explicit rights under a contract” (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). However, “even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract” (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003]). The court in *Richbell* reasoned that “the allegations here clearly go beyond claiming only that [defendant] should be precluded from exercising a contractual right; they support a claim that [defendant] exercised a right malevolently, for its own gain as part of a purposeful scheme designed to deprive plaintiffs of [] benefits” (*Id.*)

Notwithstanding the well-settled rule, *Richbell* and its progeny are distinguishable on its facts from the case at bar. In cases citing *Richbell* for the proposition that even a seemingly unlimited contractual right must be tempered with implied limitations against malevolence, the contractual rights at issue did not involve the contractual right to terminate upon notice for any reason, the right exercised here (*see e.g. Lacher v Engel*, 2006 NY Slip Op 4973, *4 [1st Dept 2006] [defendant asserted retainer provision to bill higher legal fees]; *Sterling Fifth Assocs. v. Carpentille Corp.*, 9 AD3d 261, 262 [1st Dept 2004] [defendant asserted contractual right to sell partnership asset]; *Gross v Empire Healthchoice Assur., Inc.*, 2006 NY Slip Op 50903U, *5 [Sup Ct New York County 2006] [Fried, J.] [defendant asserted contractual right to demand payment refunds or seek offsets against erroneously paid insurance claims]; *O'Neill v Warburg Pincus & Co.*, 2005 NY Misc LEXIS 3608, *21 [Sup Ct New York County 2005] [defendant asserted contractual right to apply funds toward the repayment of debts owed]). Likewise, MMC's reliance on *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, is misplaced because the issue of the implied covenant of good faith in *Maddaloni Jewelers* revolved around the defendant's acceptance of orders and the timing of deliveries, and not the defendant's termination of the agreement (41 AD3d 269, 270 [1st Dept 2007]).

However, when addressing the specific issue of the right to terminate an agreement, as opposed to other rights pursuant to the myriad provisions that may be contracted for, the Court of Appeals has held that where the parties agreed to a termination clause, it will be enforced as written (*A. S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 382 [1957]). Moreover, the Appellate Division has consistently followed this principle in holding that an unconditional termination clause gives a party the "absolute, unqualified right to terminate a contract" on notice and

[* 9]

without regard to that party's motive (*Red Apple Child Dev. Ctr. v Cmty. Sch. Dists. Two*, 303 AD2d 156, 157-58 [1st Dept 2003]; *Big Apple Car v City of New York*, 204 AD2d 109, 111 [1st Dept 1994]).

Accordingly, the Court declines to follow *Richbell*, finding *Murphy* to state the relevant and controlling rule of law. Here, the termination provision in each contract reads in relevant part: "The Agreement shall be cancelable by NECA with a thirty (30) day written notice and by MMC with a thirty (30) day written notice *for any reason whatsoever.*" (Notice of Motion Ex 1, at 2 [emphasis added].) Thus, MMC seeks to impose by implication a limitation upon NECA's unconditional contractual right to terminate upon notice.

Moreover, because the breach of contract and breach of implied covenant claims are based on the same facts and purported acts or omissions of plaintiffs, the breach of implied covenant claim should be dismissed as duplicative (*Empire State Building Associates v Trump*, 247 AD2d 214, 214 [1st Dept 1998]). Accordingly, because the implied covenant of good faith may not negate NECA's express contractual right to terminate the contracts, Defendants' motion to dismiss the cause of action for breach of the implied covenant of good faith is granted.

Breach of Contract (third cause of action)

MMC alleges that NECA breached its contract with MMC by failing to pay "for fees and bonus already earned and to reimburse for expenses incurred" (Compl ¶ 56).

Defendants argue that the breach of contract claim is predicated on NECA's exercise of a contractual right and, therefore, fails to state a claim to the extent the claim is predicated on NECA's termination of the agreements. However, Defendants do not seek dismissal of the breach of contract claim insofar as the claim alleges failure to pay fees and bonuses earned and

failure to reimburse expenses incurred on behalf of NECA.

“A party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive” (*Big Apple Car v City of New York*, 204 AD2d 109, 111 [1st Dept 1994], citing *A. S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 382 [1957]; *Red Apple Child Dev. Ctr. v Cmty. Sch. Dists. Two*, 303 AD2d 156, 157-58 [1st Dept 2003]; *Division of Triple T. Serv. v Mobil Oil Corp.*, 60 Misc2d 720 [Sup Ct Westchester County 1969], *affd*, 34 AD2d 618 [2d Dept 1970]).

Here, the identical termination provision in each contracts reads: “The Agreement shall be cancelable by NECA with a thirty (30) day written notice . . . *for any reason whatsoever.*” (Notice of Motion Ex 1, 2 [emphasis added].) Thus, NECA exercised its right pursuant to an unconditional termination clause (*Big Apple Car*, 204 AD2d at 111). Accordingly, MMC’s third cause of action for breach of contract is dismissed to the extent the claim is based on NECA’s exercise of its contractual right under the termination clauses. However, the cause of action for breach of contract continues as to fees, bonuses and/or expenses not based on the termination of the Agreements.

Breach of Fiduciary Duty (fourth cause of action)

MMC argues that the Directors violated their duty of good faith and fair dealing as members of the Board of NECA.

Defendants argue that the Directors owed no duty to MMC on two grounds. First, Defendants argue that because MMC served as an independent contractor, no fiduciary duty is imposed upon the Directors. Second, Defendants argue that although Not-For-Profit Corporation

Law § 717 imposes a fiduciary duty upon the Directors, that duty does not extend to MMC, an independent contractor.

“A fiduciary relationship arises ‘between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). “[I]t is fundamental that fiduciary ‘liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation’” (*id.*, quoting Restatement [Second] of Torts § 874, Comment b). As the Appellate Division stated in *Pergament v. Roach*, “[t]his definition expressly refers to an agency relationship and an advisory relationship in the disjunctive” (2007 NY Slip Op 5247, *2 [2d Dept 2007]).

Service as an “independent contractor” alone does not preclude the existence of a fiduciary relationship (*see e.g. Moser v Devine Real Estate, Inc. (Florida)*, 2007 NY Slip Op 6006, *3 [3d Dept 2007 [despite being an independent contract, summary judgment not warranted because of issue of whether the parties’ relationship gave rise to a fiduciary duty]; *El-Khoury v Karasik*, 265 AD2d 372, 373-74 [2d Dept 1999] [“A fiduciary relationship existed, by virtue of the parties’ status as employer and independent contractor in a professional corporation whereby the parties agreed that the plaintiff would perform medical services for patients in return for a percentage of the revenue collected by the defendants.”]; *Lipton v Unumprovident Corp.*, 10 AD3d 703, 706-707 [2d Dept 2004] [common-law duty of good faith in administering life insurance plan owed to independent contractor]).

Indeed, a fiduciary relationship may arise if a party places special trust and confidence in

another party such that a dependency is created (*see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-99 [1978]; *P. Chimento Co., Inc. v Banco Popular de Puerto Rico*, 208 AD2d 385, 386 [1st Dept 1994]; *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 159 AD2d 363, 363 [1st Dept 1990]).

While fiduciary liability is based on the relationship, a fiduciary relationship may not be inferred from bare conclusions or factual assertions flatly contradicted (*see EBC I*, 5 NY3d at 20; *Frank v Sobel*, 2007 NY Slip Op 1798, *1 [1st Dept 2007] [breach of fiduciary duty claim dismissed because no evidence was presented to establish the existence of any fiduciary relationship between the parties]). “If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.” (*Id.* [internal citations and quotation marks omitted].)

Thus, the Court must determine whether MMC sets forth sufficient allegations of a fiduciary relationship or of a relationship of higher trust, specific and apart from the agreements, that results in a fiduciary relationship. (*Id.*) Here, MMC does not allege that Rogers was under an affirmative duty “to act for or to give advice for the benefit of another upon matters within the scope of the relation.” (*Id.* at 19.) Additionally, MMC has alleged nothing to suggest that a relationship of higher trust, separate and apart from the relationship created by the Management and Fund-Raising Agreements, existed between MMC and Rogers. To the contrary, the allegations relating to the relationship outside the scope of their agreements involved Rogers’ request for “kickbacks” or to operate a business together with Mason. Each of Rogers’ requests were immediately, or subsequently, rebuffed (Compl ¶¶ 31, 32, 33, 35). As MMC alleges, “[b]efore the proposal by Ms. Rogers to go into business with MMC could be further discussed,

incidents occurred which forced Howard Mason to state to Ms. Rogers that he would not under any circumstances form a company with her” (Compl ¶ 33). Accordingly, because the allegations do not suggest anything more than an arm’s length business relationship (*Northeast Gen. Corp. v Wellington Adv. Inc.*, 82 NY2d 158, 162 [1993]), MMC fails to sufficiently allege that Rogers owed a fiduciary duty to MMC.

Second, Defendants correctly contend that directors of a not-for-profit corporation owe a fiduciary duty to the corporation (*see S.H. Helen R. Scheuer Family Foundation, Inc. v 61 Assoc.*, 179 AD2d 65, 70 [1st Dept 1992]; Not-For-Profit Corporation Law 717-a). Thus, MMC may not invoke a fiduciary duty owed by Rogers to NECA to seek recovery for damage caused to MMC.

Accordingly, because no fiduciary duty was owed to MMC by Rogers, Defendants’ motion to dismiss the fourth cause of cause of action for breach of fiduciary duty is granted.

Tortious Interference (first cause of action)

MMC alleges that Rogers knew of the Agreements between NECA and MMC (Compl ¶ 49); and that Rogers “wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse” caused NECA to terminate the Agreements with MMC (Compl ¶ 50).

Defendants argue that MMC fails to plead each of the essential elements of tortious interference by Rogers. More specifically, Defendants rely on the MMC’s failure to state a cause of action for breach of contract, of fiduciary duty, or of the implied covenant of good faith and fair dealing. To be sure, if MMC fails to establish at least one viable claim for breach, on any ground, then MMC’s tortious interference claim must also fail.

Here, by seeking dismissal of the breach of contract cause of action only in part, Defendants concede that MMC may possibly have a viable breach of contract claim at this stage.

Because MMC states a cause of action sounding in breach, namely a breach of contract, MMC's claim for tortious interference remains viable. Accordingly, Defendants' motion to dismiss the first cause of action for tortious interference is denied.

Punitive Damages (fifth cause of action)

MMC seeks punitive damages based on the alleged "egregious, knowing violation" of Rogers' duty of good faith and fair dealing (Compl ¶ 61).

The elements required to state a claim for punitive damages are: (1) an independent tort; (2) conduct egregious nature; (3) egregious conduct directed to plaintiff; and (4) a pattern directed at the public generally (*New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 315-16 [1995] [internal citations omitted]). "Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract." (*Id.*)

Here, because MMC fails to assert a viable cause of action sounding in tort, MMC's cause of action for punitive damages must fail. Defendants' motion to dismiss MMC's fifth cause of action for punitive damages is granted.

CONCLUSION

ORDERED that defendant's motion to dismiss is granted to the extent the second, fourth and fifth causes of action are dismissed; and it is further

ORDERED that defendant's motion to dismiss the third cause of action is granted in part to the extent the third cause of action is based on the right terminate upon notice; and it is further

ORDERED that defendant's motion to dismiss the first cause of action is denied.

Dated: January 7, 2008

ENTER:



J.S.C.

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